INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutes and cases sustaining jurisdiction	1
Statute of the State the validity of which is involved	3
Dates of judgment and application for appeal	4
Statement of case	4
Appendix "1"—Article I, Section 8, Constitution of the United States	14
Appendix "2"—Laws of Mississippi, 1934, Chapter 120.	14
Appendix "3"—Opinion of the Supreme Court of Mississippi	21

Table of Cases Cited

Atlantic L. Co. v. *Commissioner*, 298 U. S. 553, 80 L. Ed. 1328	12
Bowman v. *C. & N. W. R. Co.*, 125 U. S. 465, 31 L. Ed. 700	11
Carter v. *Virginia*, 88 L. Ed. 388	2
Cloverleaf Butter Co. v. *Patterson*, 315 U. S. 155, 86 L. Ed. 754	12
Coe v. *Errol*, 116 U. S. 517, 26 L. Ed. 715	10
Cooney v. *Mountain States T. & T. Co.*, 294 U. S. 384, 79 L. Ed. 934	12
Crutcher v. *Kentucky*, 141 U. S. 47, 35 L. Ed. 649	12
Diamond Match Co. v. *Ontonagon*, 188 U. S. 82, 47 L. Ed. 394	10
Dobbins v. *Erie County*, 16 Pet. 435, 10 L. Ed. 1022	11
Evans v. *McCabe*, 164 Tenn. 67	7
Flournoy v. *Wiener*, 88 L. Ed. 478	2
Follett v. *McCormick*, 88 L. Ed. 588	2, 7
Gibbons v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23	11
Graves v. *New York*, 306 U. S. 466, 83 L. Ed. 927	11
Hattiesburg Grocery Co. v. *Robertson*, 126 Miss. 34, 88 So. 4, 25 A. L. R. 728	8
Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469, 71 L. Ed. 259	10

Page

International Harvester Co. v. *Department of Taxation of Indiana*, 88 L. Ed. 905 2

International Harvester Co. v. *Wisconsin Department of Taxation*, 88 L. Ed. 1024 2

Interstate Natural Gas Co. v. *Stone*, 308 U. S. 522, 84 L. Ed. 442 9

Kentucky Whip & Collar Co. v. *I. C. R. Co.*, 299 U. S. 334, 81 L. Ed. 270 11,12

Leisy v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128 11

Looney v. *Crane Co.*, 245 U. S. 178, 62 L. Ed. 230 12

McCulloch v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579 11

Maricopa County v. *Valley National Bank*, 318 U. S. 361, 87 L. Ed. 837 12

Matson Navigation Co. v. *State Board*, 297 U. S. 441, 80 L. Ed. 791 12

Mayo v. *U. S.*, 319 U. S. 441, 87 L. Ed. 1504 12

Memphis Natural Gas Co. v. *Veeler*, 315 U. S. 649, 86 L. Ed. 1090 2,6,12

Memphis Natural Gas Co. v. *McCanless, Commissioner*, Nos. 218 and 219, October Term, 1944 6

Miller v. *Illinois Central R. R. Co.*, 146 Miss. 422, 111 So. 558 8,9

Northwestern Air Lines v. *Minnesota*, 88 L. Ed. 956 10

Pacific Coast Dairy v. *Department*, 318 U. S. 285, 87 L. Ed. 761 12

Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759, 158 U. S. 601, 39 L. Ed. 1108 10

Southern Pac. Co. v. *Gallagher*, 306 U. S. 167, 83 L. Ed. 586 12

Spector Motor Service, Inc. v. *Walsh, Tax Comm'r.*, 139 Fed. (2d) 809, 47 Fed. Supp. 671, No. 62, October Term, 1944 7

State v. *Gulf, M. & N. R. R. Co.*, 138 Miss. 70, 104 So. 689 8

State v. *Interstate Natural Gas Co.*, 284 U. S. 41, 76 L. Ed. 156 5,10

Thompson v. *Kreutzer*, 112 Miss. 165, 72 So. 891 10

U. S. v. *County of Alleghany*, 88 L. Ed. 845 2,10

U. S. v. *Southeastern Underwriters Assn.*, 88 L. Ed. 1082 12

Wilkerson v. *Rahrer*, 140 U. S. 545, 35 L. Ed. 572 11

Statutes Cited

	Page
Constitution of Tennessee, Article II, Section 28	7
Constitution of the United States, Article I, Section 8, Clause 3	1,5,10
21st Amendment	12
Judicial Code, Section 237 (28 U. S. C. A. 344a and 861a)	2
Laws of Mississippi, 1934, Chapter 120, page 185 (Mississippi Code of 1942, Title 36, Sections 9220–9261)	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 762

MEMPHIS NATURAL GAS COMPANY, ET AL.,
Appellants,

vs.

STATE TAX COMMISSION OF MISSISSIPPI,
Appellee

STATEMENT AS TO JURISDICTION UNDER RULE 12

A

Federal Statutory Provision Believed to Sustain the Jurisdiction

The State Tax Commission of Mississippi, herein called "Appellee," under Chapter 120, Laws of Mississippi 1934—"Income Tax Act of 1934," herein called "Act," demanded of Memphis Natural Gas Company, herein called "Memphis," a tax on its net income. Memphis denied liability, challenging the validity of the Act on the ground that it contravened the Commerce Clause, Article I, Section VIII, Subdivision 3, of the Constitution, a copy whereof is annexed as Appendix I. Memphis claimed that the imposition under the Act was a direct burden on interstate commerce. Appellee assessed the tax notwithstanding the claim of invalidity of Memphis, whereupon review, in accordance

with local practice, was had in the Chancery Court of Hinds County, wherein the contention of Memphis was sustained.

Memphis, in the State Supreme Court, Specifically questioned the validity of the Act, averring it to contravene the Commerce Clause, and there drew in question explicitly the validity of the Act. Notwithstanding this direct challenge, the State Supreme Court sustained the validity of the Act and denied to Memphis its federal right.

The State Supreme Court is the highest Court of Mississippi wherein this question may be determined.

Appeal herein is therefore under Section 237, Judicial code, as amended; 28 U. S. Code Annotated, Section 344 (a) —861 (a).

The decisions believed to sustain jurisdiction here are:

International Harvester Co. v. *Wisconsin Department of Taxation,* — U. S. —, 88 L. ed. 1024;

International Harvester Co. v. *Department of Taxation of Indiana,* — U. S. —, 88 L. ed. 905;

United States v. *County of Allegheny,* — U. S. —, 88 L. ed. 845, 855;

Carter v. *Virginia,* — U. S. —, 88 L. ed. 388;

Flournoy v. *Wiener,* — U. S. —, 88 L. ed. 478;

Follett v. *McCormick,* — U. S. —, 88 L. ed. 588.

Unlike the challenge had in *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 86 L. ed. 1090, Memphis here launched its attack directly upon the validity of the statute as applied to it.

B

The Statute of the State, the Validity of Which Is Involved, (Chapter 120, Laws of Mississippi 1934, Page 185; Mississippi Code of 1942, Title 36, Sections 9220-9261).

Chapter 120, Laws of Mississippi 1934, page 185, here challenged, appears, so far as pertinent in Appendix II, but its more pertinent provisions are, as quoted by Mississippi's Supreme Court herein, Appendix III:

"Section 3 (1), Chapter 120, Laws of 1934, provides:

" 'There is hereby assessed and levied to be collected and paid as hereinafter provided for the year 1934 and for each calendar year thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates: * * *'

"The last paragraph of the same section then provides:

" 'A like tax is hereby imposed to be assessed, collected and paid annually at the rates specified in this section and as hereinafter provided upon and with respect to the entire net income, from all property owned and from every business, trade or occupation carried on in this state by individuals, corporations, partnerships, trusts or estates, not residents of the State of Mississippi.'

"Section 11 (1) of the same act provides:

" 'In the case of foreign corporations or of a nonresident or citizen of a foreign country the following items of gross income shall be treated as income from sources within the State:

" '(a) * * * rentals or royalties from property or any interest in property within the State, and income

from the operation, or ownership of any property within the State, * * *''".

C.

Dates of Judgment and Application for Appeal

The judgment of the Supreme Court of Mississippi here sought to be reviewed was rendered October 9, 1944, modified and becoming final, October 23, 1944.

Appeal was allowed on the 30 day of November, 1944.

D

Statement of Case

Memphis, a foreign corporation not qualified in Mississippi and having no commercial domicile therein but engaged solely in interstate commerce, realizing in Mississippi its sole revenue by delivering at wholesale natural gas from its pipe lines to the Mississippi Power & Light Company, the distributing company (with whom it is in no way connected), was held by the State Tax Commission liable for this income tax upon that part of its net income attributable to interstate business carried on in Mississippi. Therefrom, appropriate review was had in the Chancery Court, Hinds County, First District (Chancellor's Opinion, R., 36-44), sustaining the contention of Memphis. Thereafter, on appeal, the decree was reversed, the validity of the statute sustained and the federal right of Memphis denied.

Memphis, after administrative proceedings, raised the federal question in its Petition for Redetermination thus:

1. "That herein sought is a determination that the income of * * * (Memphis) is not taxable * * * under * * * Chapter 120, Laws of 1934 * * * for the years 1937-1941, inclusive, for these reasons:

"(a) The legislature did not intend to hamper, burden or embarrass interstate commerce by making this statute

applicable to a foreign corporation exclusively engaged in interstate commerce.

"(b) If said statute does include such a corporation exclusively so engaged, then it violates:

"(1) The Commerce Clause, Article I, Section VIII, of the Constitution of the United States;

"(2) The Due Process Clause, Article XIV, Section 1, of the Amendments to the Constitution of the United States; and

"(3) The equal Protection Clause, Article XIV, Section 1, of the Amendments to the Constitution of the United States." (R. 26.)

The claim of Memphis having been sustained by the Chancellor, Appellee appealed, and on such appeal, the Missisippi Supreme Court reversed the decree of the Chancellor, sustained the validity of the statutes and denied the claim of federal right by Memphis (R. 48), Appendix III hereto, page 9 therein.

This Federal question is substantial and important, never having been previously decided, as Memphis contends, by this court, viz., May a State exact an income tax from a foreign corporation upon net income realized solely from the sale of natural gas moving into that state as interstate commerce if the foreign corporation has neither a commercial domicile therein nor has qualified for business therein.

Memphis claims such an income tax, though non-discriminatory, directly burdens interstate commerce.

The method wherein Memphis does business is accurately reflected in *State* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 76 L. ed. 156, wherein Mr. Justice Holmes stated the facts there stipulated, but here admitted by demurrer:

> "The gas flows continuously from the gas fields in Louisiana and obviously, for much the greater part at

> least, in interstate commerce. But the appellants rely upon business done under two similar contracts made in New York to show that there was intrastate commerce in Mississippi that may be taxed without burdening the main activity *that the State cannot touch.*[1] (Citing cases) * * * The gas withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff which is the only way in which it can be measured. The pressure of the gas is reduced by the plaintiff before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi. The plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it by retail (Citing cases)."

The business and contract of Memphis followed precisely this pattern and the business of Memphis in Tennessee was here reviewed (*Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 86 L. ed. 1090; also, *Memphis Natural Gas Co.* v. *McCanless, Commissioner,* October Term, 1944, Nos. 218 and 219).

1. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 86 L. ed. 1090.

Mississippi's Supreme Court assumed to hold this case conclusive, quoting therefrom thus:

> "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation * * * derived from within the State (Citing cases), is not prohibited by the commerce clause on which alone taxpayer relies."

---

[1] Italics ours, unless otherwise noted.

With deference, this Court did not there decide this case because:

(a) There cannot be an "income tax in Tennessee."

Tennessee's Constitution, Article II, Section 28, forbids. Appendix IV. *Evans* v. *McCabe,* 164 Tenn. 67.

(b) Tennessee's Supreme Court held the Memphis Natural Gas Company liable for Tennessee excise taxes because it was engaged in intrastate business, that is, joint participation in profits derived from the local distribution of natural gas by its partner, the Memphis Power & Light Company. This view was also adopted by this court. Had it been that irrespective of the intrastate business the tax by Tennessee could have been imposed upon the business of Memphis, exclusively interstate, with deference, neither local Court, nor opposite counsel, nor this Court would have given such meticulous care to the definition of the proper participation in local distribution, for had the interstate commerce been subject to taxation there would have been no need for either raising or deciding the character of the participation of Memphis in the local profit distribution.

Follett v. *Town of McCormick,* — U. S. —, 88 L. ed. 588.

(c) The cases cited by the Chief Justice therein for this alleged doctrine, with deference, do not so thus declare it, for had they so done, there would have been

(1) No necessity for a review in the *Beeler Case* on Certiorari as to this proposition, which would have been precedently judicially established by these cases; and

(2) No necessity for granting Certiorari in *Spector Motor Service, Inc.* v. *Walsh, Tax Comr.,* 2 Cir., 139 Fed. 2d 809, 47 Fed. Supp. 671, No. 62, October Term, 1944.

2. Mississippi's definition of the tax imposed by Chapter 120, Laws of Mississippi, 1934, page 185.

> "Income is necessarily the product of the joint efforts of the state and the recipient of the income, the state furnishing the protection necessary to enable the recipient to produce, receive, and enjoy it, and a tax thereon, in the last analysis, is simply a portion cut from the income and appropriated by the state as its share thereof, and, while a tax on income includes some of the elements both of a tax on property and of a tax on persons, it cannot be classified as strictly a tax on either, for it is generically and necessarily an excise, and should be enforced as such unless and until so to do would accomplish the result which Section 112 of the Constitution was adopted to prevent, which is to prevent discrimination in the taxation of property, so that all property shall bear its due proportion of the burdens of government." *Hattiesburg Grocery Co.* v. *Robertson,* 126 Miss. 34, 88 So. 4, 25 A. L. R. 728.

Therein four members of Mississippi's court held this an excise. Justice Sykes, with whom concurred Justice Anderson, held the tax to be one on property. Compare *State* v. *Gulf, M. & N. R. R. Co.,* 138 Miss. 70, 104 So. 689; *Miller* v. *Illinois Central R. R. Co.,* 146 Miss. 422, 111 So. 558.

3. Pertinent local decisions as to contravention of the commerce clause.

(a) As shown in the opinion of Mississippi's Court, Appendix III, there were three causes in the Federal District Court; No. 343, involving the privilege tax; No. 344, involving the franchise tax, Chapter 100, Mississippi Code of 1930; and No. 345, involving the income tax act then in effect, but the precise equivalent of the Act of 1934. In each of these cases the Interstate Natural Gas Company questioned the several statutes assuming to interpose the tax on the ground that, being engaged as a foreign corpo-

ration exclusively in interstate commerce, these statutes were respectively void.

Mississippi's Attorney General saw fit to appeal only in No. 343, wherein the decree was affirmed, 284 U. S. 41, 76 L. ed. 156, the law department of Mississippi treating the three cases as essentially similar.

(b) In the brief filed by the Attorney General in *Interstate Natural Gas Co.* v. *Stone,* 308 U. S. 522, 84 L. ed. 442, this view was still adhered to, the Court saying:

> " 'Every intelligent man knows, and the legislature in enacting this law well knew, that a tax could not be imposed by our legislative department on interstate commerce, and that no law could be passed burdening interstate commerce or seriously embarrassing railroads in doing such business, or in doing business for the United States government. It is therefore unreasonable to assume that the legislature had any intention of burdening or embarrassing interstate commerce. * * *'
>
> " 'We cannot give to general provisions of any statute a meaning that would lead to absurdity, or that would convict the legislature of attempting to deal with a subject clearly beyond its jurisdiction. The spirit and reason of the law certainly prevail over the strict letter' " (Brief, p. 39).

(c) With deference, the Supreme Court of Mississippi, 1927, so thus construed the commerce clause in *Miller* v. *Illinois Central R. Co.* (1927), 146 Miss. 422, 111 So. 558, saying:

> "It is unquestioned that the state cannot lay a tax on interstate commerce in any form whatever, whether the tax be on the transportation of the subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying on the commerce. The imposition of such a tax would be violative of

the commerce clause of the federal Constitution, subsection 3, Section 8, of Article 1 (Citing cases). * * *

Compare *State* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 76 L. ed. 156, 157, where Mr. Justice Holmes, after accurately epitomizing appellant's business, declared, "That the state cannot touch."

4. Peculiarities of the interstate business of Memphis.

(a) An ad valorem tax may burden under the commerce clause.

Northwestern Air Lines v. *Minnesota*, — U. S. —, 88 L. ed. 956;

Compare

United States v. *County of Allegheny*, — U. S. —, 88 L. ed. 845.

(b) The movement of the gas itself in interstate commerce constitutes the business of Memphis.

This is not a tax upon the facilities utilized for interstate commerce, but upon the commerce itself, qua interstate commerce, whereon that thus moving as commerce the state may not impose an ad valorem tax. *Coe* v. *Errol*, 116 U. S. 517, 26 L. ed. 715; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, 47 L. ed. 394; *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U. S. 469, 71 L. ed. 259.

(c) When the tax is thus laid, it becomes therethrough direct and a burden.

Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 39 L. ed. 759, 158 U. S. 601, 39 L. ed. 1108;

Thompson v. *Kreutzer*, 112 Miss. 165, 72 So. 891;

Thompson v. *McLeod*, 112 Miss. 383, 73 So. 193.

(d) Controlling decisions of this Court.

(1) *McCulloch* v. *Maryland,* 4 Wheat. 316, 425, 4 L. ed. 579, stating:

> " 'That the states have no power, *by taxation* or otherwise, to retard, *impede, burden,* or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.' "

(2) *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. ed. 23.

(3) *Dobbins* v. *Erie County,* 16 Pet. 435, 10 L. ed. 1022.

We are mindful of *Graves* v. *New York,* 306 U. S. 466, 83 L. ed. 927, and note that as soon as this judicial declaration was made the Congress forthwith acted:

> " 'The United States hereby *consents* to the taxation of compensation, *received after December 31, 1938,* for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.' 5 U. S. C. A., p. 22, (Supplement, p. 27) Sec. 84a."

And, with deference, that connoted by such action was and is that prior to December 31, 1938, legislatively, such a tax still is a burden and may not, with deference, be imposed.

(4) *Bowman* v. *C. & N. W. R. Co.,* 125 U. S. 465, 31 L. ed. 700; *Leisy* v. *Hardin,* 135 U. S. 100, 34 L. ed. 128; *Wilkerson* v. *Rahrer,* 140 U. S. 545, 35 L. ed. 572, whereasto Congress likewise authorized legislatively the states to burden. Compare *Kentucky Whip & Collar Co.* v. *I. C. R. Co.,*

299 U. S. 334, 81 L. ed. 270; 21st Amendment; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 155, 86 L. ed. 754, 762.

(5) *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649.

(6) *Looney* v. *Crane Co.*, 245 U. S. 178, 62 L. ed. 230.

(7) *Atlantic L. Co.* v. *Commissioner*, 298 U. S. 553, 80 L. ed. 1328.

(8) *Matson Navigation Co.* v. *State Board*, 297 U. S. 441, 80 L. ed. 791.

(9) *Cooney* v. *Mountain States T. & T. Co.*, 294 U. S. 384, 79 L. ed. 934.

(10) *Southern Pac. Co.* v. *Gallagher*, 306 U. S. 167, 83 L. ed. 586.

(11) *Memphis Natl. Gas Co.* v. *Beeler*, 315 U. S. 649, 86 L. ed. 1090.

(12) *Maricopa County* v. *Valley Nat. Bank*, 318 U. S. 361, 87 L. ed. 837.

(13) *Pacific Coast Dairy* v. *Department*, 318 U. S. 285, 87 L. ed. 761.

(14) *Mayo* v. *United States*, 319 U. S. 441, 87 L. ed. 1504.

So that if authorization from Congress is required to validate state action in this aspect it should similarly be required here.

(e) Commerce has been substantially redefined.
United States v. *Southeastern Underwriters Assn.*, —— U. S. ——, 88 L. Ed. 1082.

And having so been, the power of the state threasto should likewise, with deference, so be, but we respectfully submit that the right to tax as income the proceeds of

the converted commodity moving in interstate commerce may not be exercised when thus to do the state is authorized therefrom to exercise that having its genesis solely in a movement whereover federal power is exclusive.

But should in this regard the Court disagree with us and hold that appeal is not the proper remedy, then pursuant to Section 237(c) of the Judicial Code, 28 U. S. Code Annotated, Section 344(c), we ask that this be treated as an application for Certiorari. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 651, 86 L. Ed. 1094.

Respectfully,

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APPENDIX I

Constitution of the United States

Section VIII

The Congress shall have Power

* * * * * * *

3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *.

APPENDIX II

Laws Mississippi, 1934

CHAPTER 120

House Bill No. 150

AN ACT levying an income tax on individuals, corporations, associations, trusts, and estates, for the benefit of the general fund of the state of Mississippi—providing a method for determining taxable income and for the levying, assessment, collection, and payment thereof—and repealing chapter 124, code of 1930, and chapters 96 and 97, laws of 1932.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* that this act may be cited as the income tax act of 1934.

SEC. 2. When used in this act:

(a) The word taxpayer includes any individual, partnership, corporation, association, trust or estate, subject to a tax imposed hereunder, or whose income is in whole or in part, subject to a tax imposed hereunder.

(b) The term domestic when applied to any corporation or association, including partnerships, means created or organized in the state of Mississippi.

(c) The term foreign when applied to any corporation or association including partnerships, means created or organized outside the state of Mississippi.

• • • • • • •

(e) The word resident means natural persons and includes for the purpose of determining liability to the tax imposed by this act upon or with reference to the income of any taxable year, any person domiciled in the state of Mississippi and any other person who maintains a permanent place of abode within the state.

(f) the word non-resident when used in connection with this act, shall apply to any natural person whose domicile is without the state of Mississippi.

(g) The word foreign country or foreign government means any jurisdiction other than the one embraced within the United States. The words United States includes the states, the territories of Alaska and Hawaii, and the District of Columbia.

(h) The term commissioner when used herein means the chairman of the state tax commission.

(i) The words taxable year mean the calender year or fiscal year ending during such calendar year upon the basis of which the net income is computed hereunder. The words fiscal year mean an accounting period of twelve months, ending on the last day of any month other than December.

(j) The words paid or accrued mean paid or accrued, or paid or incurred, and the terms paid or incurred or paid or accrued shall be construed according to the method of accounting upon the basis of which the net income is computed. The term received for the purpose of computation of net income means received or accrued and the term received or accrued shall be construed according to the method of accounting upon the basis of which the net income is computed.

(k) The word dividend means any distribution made by a corporation, association, trust or estate, to its share

holders or members, whether in cash or other property or its own stock.

Imposition of the tax

SEC. 3. (1) There is hereby assessed and levied to be collected and paid as hereinafter provided for the calendar year 1934 and for each calendar year thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates:

• • • • • • •

On all taxable income in excess of $15,000.00 at the rate of six per centum.

A like tax is hereby imposed to be assessed, collected and paid annually at the rates specified in this section and as hereinafter provided upon and with respect to the entire net income, from all property owned and from every business, trade or occupation carried on in this state by individuals, corporations, partnerships, trusts or estates, not residents of the state of Mississippi.

Tax a debt

SEC. 4. The tax herein imposed, and all increases, interest, and penalties, is in addition to all other taxes imposed by law, and every tax in addition to being a tax against the property, business, trade, profession, or occupation, shall also become from the time it is due and payable a personal debt from the taxpayer liable to pay the same to the state of Mississippi.

• • • • • • •

Net income defined

Sec. 6. (a) The term net income means the gross income as defined hereunder, less the deductions allowed.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period, either fiscal or calendar year, in accordance with the method of accounting regularly employed in keeping the books of such taxpayer.

(c) But if no such method of accounting has been employed or if the method employed does not clearly reflect the income the computation shall be made upon such basis and in such manner as in the opinion of the commissioner does clearly reflect the income.

(d) If the taxpayer's annual accounting period is other than a fiscal year as defined by this act or if he has no annual accounting period, or does not keep books, the net income shall be computed upon the basis of the calendar year.

(e) The taxpayer may elect to file his first return on the basis of receipts and disbursements or the accrual basis, but having exercised this election, he must secure the permission of the commissioner to change such basis.

Gross income defined

Sec. 7. For the purpose, except as otherwise provided for non-residents, the term gross income:

(a) Includes gains, profits, and income derived from salaries, wages or compensation for personal service of whatever kind, and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, also interest, rent, dividends, securities or other transaction of any business carried on for gain or profit or gains, or profits, and incomes derived from any source whatever, including salaries, wages, and other compensation received from the state of Mississippi, any of its departments, institutions or political subdivisions. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer. Gains realized from the disposition of assets regularly employed in the conduct of the regular trade or business shall be determined by deducting from the amount realized, plus the depreciation sustained, the cost of such asset. If the asset was acquired prior to March 16, 1912, the value as of that date shall be used as the cost.

* * * * * * *

Deductions allowed

Sec. 8. In computing the net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

• • • • • • •

Net income of non-resident and foreign taxpayers

Sec. 11. (1) In the case of foreign corporations or of a nonresident or citizen of a foreign country the following items of gross income shall be treated as income from sources within the state.

(a) Insurance premiums, interest on bonds, notes or other interest bearing obligations of residents, corporate or otherwise; the amount received as dividends from domestic corporations, provided income from any loan by non-residents or foreign corporations or citizens of a foreign country, shall not be included as taxable income, or from foreign corporations of which more than fifty per cent (50%) of the gross income was derived from sources within the state; compensation for personal service or labor performed within the state; rentals or royalties from property or any interest in property within the state, and income from the operation, or ownership of any property within the state; and income realized from the disposition of any property employed in the regular trade or business of the taxpayer. The basis for determining such gain or loss shall be as provided in sections 7 and 8 of this act.

(b) From the items of gross income specified herein there shall be deducted the expenses, losses, and other deductions properly apportioned, or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot be definitely allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the state.

(c) In the case of gross income derived from sources partly within and partly without the state the net income

may first be computed by deducting the expenses, losses, or other deductions apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such taxable income attributable to sources within the state may be determined by processes or formulas of general apportionment prescribed by the commissioner with the approval of the governor.

(2) Gains, profits, and income from transportation or other services rendered partly within and partly without the state or from the sale of personal property produced by the taxpayer within and sold without or produced by the taxpayer without and sold within the state shall be treated as derived partly from sources within and partly from sources without the state, and such gains, profits, and the income shall be determined under such processes or formulas of general apportionment as are prescribed by the commissioner with the approval of the governor.

(3) Gains, profits and income derived from the purchase of personal property within and its sale without the state, or from the purchase of property without and its sale within the state shall be treated as derived entirely from the state in which sold.

(4) A foreign corporation or a non-resident or citizen of a foreign country shall secure the benefit of the deductions and credits allowed by this act only by filing or causing to be filed with the commissioner a true and accurate return of his total income, corporate or otherwise, in the state in the manner prescribed in this act including therein all information which the commissioner may deem necessary for the calculation for such deductions and credits.

(5) In the case of a failure to file a return the commissioner shall collect the tax on such income and all property belonging to such foreign corporation, non-resident or citizen of a foreign country shall be liable for the tax.

* * * * * * *

Corporation returns

Sec. 18. (a) Every corporation subject to taxation shall make a return, stating specifically, the items of its gross income, and the deductions and credits allowed by this act, the returns shall be sworn to by the president, vice-president, or other principal officer, and by the treasurer or assistant treasurer.

(1) If any foreign corporation has no office or place of business in this state but has an agent in this state, the returns shall be made by the agent.

(2) In case of a receiver, trustee in bankruptcy or assignees operating the property or business of a corporation, such receiver, trustee or assignees shall make returns for such corporation in the same manner and form as corporations are required to make returns, and any tax due on basis of such returns shall be collected in the same manner as if collected from the corporations of whose business or property they have custody or control.

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Time and place of payment of tax

Sec. 23. Except as otherwise provided the tax may be paid in four installments each consisting of one-fourth of the total amount of the tax.

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Administration—chairman of the state tax commission to administer this act

• • • • • • •

Invalidity of part of act not to invalidate entire act

Sec. 39. If any clause, sentence, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered.

• • • • • • •

Sec. 41. That this act shall take effect and be in force from and after January 1, 1934.

Approved March 14, 1934.

APPENDIX III

IN THE SUPREME COURT OF MISSISSIPPI

No. 35,692

(Opinion Rendered October 9, 1944)

In Banc:

STATE TAX COMMISSION

vs.

MEMPHIS NATURAL GAS CO.

McGEHEE, J.

The petition of the Memphis Natural Gas Company, a Delaware Corporation, filed herein against the State Tax Commission seeks a judicial review of certain tax assessments levied by such Commission under the state income tax act (Chapter 120, Laws of 1934 and amendments thereto), on the net income of the petitioner for the years 1937-1941, inclusive, attributable to the ownership and use of the property of such Gas Company within this state devoted exclusively to the business of interstate commerce, it being claimed that such imposition of taxes violated the commerce clause of the Federal Constitution, Article I, Section VIII thereof.

The petition concedes that if the petitioner is liable for the taxes levied and assessed by the State Tax Commission against it for said years, the amount of such net income taxes and the accrued interest thereon would aggregate the sum thus demanded; that the formula used by the taxing authorities in arriving at the net income of the petitioner attributable to its ownership of property in this State during each of said years, and in allocating the same, was

a proper one; and that such assessment was duly and regularly made and is in all respects true and correct if any tax was due.

The State Tax Commission demurred to such petition for a judicial review of this assessment. The demurrer was overruled and the State Tax Commission having declined to plead further, a final judgment was rendered by the court below adjudicating that the petitioner was not liable for such taxes. From this judgment the State Tax Commission has prosecuted this appeal.

The net income on which the tax is claimed was derived from the sale of natural gas at wholesale to the Mississippi Power and Light Company, a non-resident corporation doing business in this State. The gas was delivered at various points in Mississippi along the pipe-line of petitioner Memphis Natural Gas Company, which extends from the Monroe, Louisiana, gas field through Arkansas and Mississippi and then terminates at Memphis in the State of Tennessee. The gas thus sold by the petitioner was delivered to the said purchaser from the main pipe-line at or near thirteen municipalities within this State under a contract made in a foreign state and was thereupon sold and distributed at retail by the purchaser to its own customers in such municipalities.

The main contentions of the appellee Gas Company are: First, that Chapter 120, Laws of 1934, and amendments thereto, was not intended to apply to foreign corporations doing an interstate business exclusively and whose presence or ownership of property in this State is wholly to further its interstate business. Second, that the State of Mississippi may not levy a tax, although nondiscriminatory, upon the net earnings of a foreign corporation attributable to its activities in this State and resulting from its ownership of property in this State, where the petitioner's property in this state is used exclusively in the furtherance of its interstate business, without violating the commerce clause of the Constitution, Article I, Section VIII thereof.

Section 3 (1), Chapter 120, Laws of 1934, provides:

"There is hereby assessed and levied to be collected and paid as hereinafter provided for the year 1934 and for

each calendar year thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates: * * *".

The last paragraph of the same section then provides:

"A like tax is hereby imposed to be assessed, collected and paid annually at the rates specified in this section and as hereinafter provided upon and with respect to the entire net income, from all property owned and from every business, trade or occupation carried on in this state by individuals, corporations, partnerships, trusts or estates, not residents of the State of Mississippi."

Section 11 (1) of the same act provides:

"In the case of foreign corporations or of a non-resident or citizen of a foreign country the following items of gross income shall be treated as income from sources within the State:

"(a) * * * rentals or royalties from property or any interest in property within the State, and income from the operation, or ownership of any property within the State, * * *".

It will be readily seen that so far as the language of the statute is concerned there can be no question as to whether or not it is sufficient to impose the tax here involved, but it is urged by the appellee that it could not have been the intention of the legislature in enacting the said income tax law of 1934 to impose such taxes upon a foreign corporation engaged exclusively in interstate business in Mississippi, in view of the decisions of the State and Federal Supreme Courts at that time, as well as decisions of Federal District Judges composing a special court in three cases of litigation between the Interstate Natural Gas Company and the said State Tax Commission involving certain privilege and franchise taxes and the state income tax, respectively, under the Mississippi Code of 1930, as to whether or not such a tax would contravene the commerce clause of the Federal Constitution. In other words, the appellee invokes as a

principle of construction that statutes are to be construed as they were intended to be understood when they were passed in the light of court decisions existing at such time.

Assuming for the purpose of this decision that, although the language employed in the above quoted Sections of Chapter 120, Laws of 1934, is plain and unambiguous, we are entitled to resort to an examination of the court decisions existing at the time of the enactment of this statute to determine whether the legislature really intended to impose a tax on the net income of a foreign corporation engaged exclusively in interstate business in Mississippi, let us review what the courts had held at that time on the question of whether or not the imposition of such a tax would in fact contravene the commerce clause of the Federal Constitution here invoked.

In the case of Knox v. G. M. & N. R. R. Co., 130 Miss. 70, 104 So. 689, decided by this Court in March, 1925, it was said:

"The income of the Gulf, Mobile and Northern Railroad Company is derived from both inter and intrastate commerce, and its contention is that a tax by the state on that portion of its income derived from interstate commerce is a burden on such commerce within the meaning of this clause of the Federal Constitution. If the tax were on gross income a serious question would here by presented, but it is not on gross, but on net, income, and a tax on net income, derived in whole or in part from interstate commerce, is not a burden thereon within the meaning of this clause of the Federal Constitution, as pointed out by the Supreme Court of the United States in Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E 748; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45, 65 L. ed. 169; Shaffer v. Carter, 252 U. S. 36, 40 S. Ct. 221, 64 L. ed. 445; Atlantic Coast Line R. Co. v. Daughton, 262 U. S. 413, 43 S. Ct. 620, 67 L. ed. 1051."

At the time of the decision of this Court in the Knox case, *supra*, the Supreme Court of the United States had

said in the case of Glue Co. v. Oak Creek, cited in our court's opinion, that:

"Stated concisely, the question is whether a state in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computations the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States."

Thereupon, the Court undertook to lay down the basis of distinction between direct and indirect burdens on interstate commerce, after citing the case of Peck & Co., v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 S. Ct. 432, as its authority therefor, and said:

"The distinction between a direct and an indirect burden by way of tax or duty was developed, (In the Peck & Co. v. Lowe case) and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source, or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

In discussing the effect of a tax upon net incomes, the Court then said:

"Such a tax, when imposed upon net incomes from whatever sources arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states.

"And so we hold that the Wisconsin Income Tax Law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce along the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business."

Also in Shaffer v. Carter, cited in the opinion of our Court in the Knox case, supra, the Supreme Court of the United States had said:

"And we deem it clear under principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose person are subject to its control, it may as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon income accruing to non-residents from their property or business within the state, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders."

Further on, the court said:

"It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce." Citing Clue Co. v. Oak Creek, supra, and other cases.

It is true that, as suggested by counsel for appellee, in the case of Glue Co. v. Oak Creek, supra, the taxpayer was a domestic corporation engaged in interstate commerce, whereas in the case at bar the appellee is a foreign corporation, and is not present in this state otherwise than by the existence of its pipe line from which gas is delivered through meters at the several municipalities to the wholesale purchaser; also, that in the case of Shaffer v. Carter supra, the taxpayer Shaffer was a nonresident individual instead of a corporation and was apparently engaged in both intra and interstate commerce, and wherein the Court held that an income tax upon his interstate business could be assessed, saying, among other things, that "It is sufficient to say that the tax is imposed not upon the gross receipts • • • but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce." Citing authorities.

Moreover, when our state income tax act (Chapter 120, Laws of 1934) was enacted on March 14, 1934, the Supreme Court of North Carolina in the case of Maxwell v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397, had held that:

"A state may not impose any tax which results in laying a direct burden upon interstate commerce. But a state may, in levying a general income tax, include within the taxable *statutes* so much of the net income derived from interstate commerce as is properly apportionable to operations or business within the state." And cited in support

of this position, Glue Co. v. Oak Creek, supra, Shaffer v. Carter, supra; and Travis v. Yale Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. ed. 460. Later in the opinion, the Court stated:

"A state may tax the net income of a foreign corporation doing business within its taxing jurisdiction, and may include therein all portions of such net income arising from interstate commerce, properly apportionable to the state. Underwood Typewriter Co. v. Chamberlain, supra; Bass, Ratcliff & Gretton v. State Tax Commision, 266 U. S. 271, 45 S. Ct. 82, 69 L. ed. 282; Maxwell v. Bans Rees' Sons, 199 N. C. 42, 153 S. E. 850; id. 283 U. S. 123, 51 S. Ct. 385, 75 L. ed. 879."

Thereupon the case of Maxwell v. Kent-Coffey Co., supra, was appealed to the Supreme Court of the United States and was there affirmed by the Court on January 22, 1934, when it was held that "This case is controlled by the decision in Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45, * * *." 291 U. S. 642, 78 L. Ed. 1040. It had been held in the Underwood Typewriter Co. case referred to above, that "A tax measured by net proceeds is valid, although these proceeds may have been derived in part, or indeed mainly, from interstate commerce * * *." Citing Glue Co. v. Oak Creek, and Shaffer v. Carter, supra.

In the North Carolina case it appears that although the taxpayer was a foreign corporation it was engaged in operating a manufacturing plant in the state and from which it shipped its products in interstate commerce. However, the philosophy of this decision, and of those rendered in the cases of Glue Co. v. Oak Creek and Shaffer v. Carter, is that a tax on net income derived from interstate commerce does not lay a direct burden on such commerce.

But the appellee has cited the case of Miller v. Illinois C. R. R. Co., 146 Miss. 422, 111 So. 555, decided in September, 1926, prior to the enactment of the state income tax law of 1934 now involved in the case at bar, in support of its contention that our Court had previously decided that the State could not lay a tax on interstate commerce in any

form whatever without violating the commerce clause of the Federal Constitution. However, the sole question for decision in that case was whether or not the Railroad Company, a foreign corporation engaged in both intra and interstate commerce within the state, was liable for income taxes before the enactment of Chapter 132, Laws of 1924, and under the provisions of Chapter 101, Laws of 1912, as amended by Chapter 116, Laws of 1914, the tax there involved being for the years 1918 to 1923, inclusive. In its opinion the Court stated that "One ground of appellee's demurrer was that under the laws of this State, not until Chapter 132, Laws of 1924, went into effect was a foreign railroad company doing business in this state, engaged in both intra and interstate commerce, liable for an income tax. We decide that question alone, * * *." The Court then construed the provisions of said Act of 1912 as amended by that of 1914, and held that it was not the purpose of the legislature to impose an income tax on such a foreign corporation in view of the several provisions of these statutes which appeared to negative such intention. The Court concluded its opinion by saying: "We are of the opinion that no income taxes were imposed by our statutes on railroads of the character of appellee until Chapter 312, Laws of 1924." Therefore, the statement made by the Court in the case in the course of its opinion to the effect that "the state cannot lay a tax on interstate commerce in any form whatever", etc., without violating the commerce clause of the Federal Constitution, was not a conclusion then necessary to the decision of the case. Moreover, the general statement thus made could not be made applicable to a tax on net income derived from interstate commerce, without disregarding the decisions of the Supreme Court of the United States in the cases of Glue Co. v. Oak Creek, and Shaffer v. Carter, hereinbefore discussed.

Therefore, in view of what this Court had said in the case of Knox v. G. M. & N. RR. Co., supra, and which had not been overruled by the case of Miller v. I. C. R. R. Co., supra, we would not be warranted in saying that the Legislature did not intend to provide for the assessment of the taxes involved in the case at bar when it enacted the state

income tax act of 1934 and employed language sufficiently clear to include such taxes.

But it is also urged by the appellee that such intention on the part of the Legislature is negatived by the fact that three cases were filed in the Federal Court in 1931 by the Interstate Natural Gas Company against the State Tax Commission, and which had been decided adversely to the State Tax Commission in its attempt to collect privilege taxes, franchise taxes and income taxes, respectively, from the said Gas Company; that case No. 343, involving the claim for privilege taxes was appealed to the United States Supreme Court, (284 U. S. 41, 76 L. ed. 157), and was there affirmed on the ground that the Gas Company was engaged exclusively in interstate commerce, and wherein Mr. Justice Holmes pointed out that this interstate commerce "the State cannot touch"; that Case No. 344 involving a claim for franchise taxes was not appealed; and that Case No. 345, involving an attempt to collect income taxes from the Gas Company under the state income tax law of 1924 was also not appealed, and with the result that an injunction issued by a three judge court composed of Circuit Judge Walker and District Judges Holmes and Borah, remained in full force and effect whereby the State Tax Commission was enjoined from collecting the income tax from the said Interstate Natural Gas Company because of the fact that it was a foreign corporation and engaged wholly and exclusively in interstate commerce in the State of Mississippi.

In determining whether or not this previous litigation in these three cases should be persuasive in support of the contention that the legislature did not by its enactment of the state income tax law of 1934 intend to levy a tax on the net income of a foreign corporation engaged exclusively in interstate commerce in this State, it is sufficient to say that as to the first two cases, involving privilege taxes and franchise taxes, respectively, the Supreme Court of the United States had theretofore held that a state could not tax the privilege of a corporate franchise in that behalf.

So that when Mr. Justice Holmes said on the appeal of the first of these cases that this interstate commerce "the state cannot touch", he had in view the tax on the privilege of transacting such interstate commerce business. As to the last of these cases the adverse decision against the State Tax Commission, although not appealed from, is not *res adjudicata* between the parties to the present litigation, since the appellee here was not a party to that suit. Neither did the judgment of the said three-judge federal court preclude the legislature from thereafter levying the tax here involved, nor did it negative its intention so to do merely because the State Tax Commission had failed to take an appeal from such judgment and obtain a dissolution of the said writ of injunction. On the other hand, we are of the opinion that the legislature was warranted in assuming that the tax on the net income from the ownership of any property within this State devoted exclusively to interstate commerce would be sustained by both the State and Federal Supreme Courts in view of the decision in Knox v. G. M. & N. R. Co., and the Federal Supreme Court decisions hereinbefore discussed, which hold that such a tax on net income is not a direct burden on interstate commerce. Moreover, no case where a foreign corporation was engaged exclusively in interstate commerce, and was not present in the taxing state otherwise than by its ownership of the property within the state from which the income sought to be taxed was derived, had been decided to the contrary.

And it is now well settled by the decisions of the Supreme Court of the United States rendered since the enactment of our income tax act of 1934, that "in imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states, or with foreign nations, to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations." McGoldrick v. Berwin-White Coal Mining Co., 309 U. S. 33, 84 L. ed. 565, and the cases therein cited. It was further said in the McGoldrick case, supra:

"But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business. Western Life Stock Assn. v. Bureau of Revenue, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546, 115 A. L. R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the pay of economic forces, affect interstate commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce."

In the recent case of Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 86 L. ed. 920, wherein the petitioner in the case at bar was assessed with a tax on net income by the State of Tennessee, because of income derived from the operation of this interstate gas pipe line, and where the tax was limited in its application to only that part of the gas company's net profits which arose in the State of Tennessee, the contention was made that a foreign corporation engaged solely in interstate commerce was not subject to the tax. The tax was upheld, apparently on the theory that the Gas Company had a commercial domicile in the City of Memphis, Tennessee, and was contractually interested in the profits made by the purchaser of its gas in that state. However, the Supreme Court of the United States there re-affirmed the principle of liability for net income taxes on interstate commerce by saying:

"In any case, even if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, cf. Wheeling Steel Corp. v. Fox, 298 U. S. 193, 80 L. ed. 1143, 56 S. Ct. 773, supra, or upon net income derived from within the state, Shaffer v. Carter, 252 U. S. 37, 57, 64 L. ed. 445, 458, 40 S. Ct. 221; Wisconsin v. Minnesota Min. & Mfg. Co., 311 U. S. 452, 85 L. ed. 274, 61 S. Ct. 253; cf. New York ex rel Cohn v. Graves, 300 U. S. 308, 81 L. ed. 666, 57 S. Ct. 466, 108 A. L. R. 721, is

not prohibited by the commerce clause on which alone taxpayer relies. United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499 Ann. Cas. 1918E 748; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 119, 120, 65 L. ed. 165, 168, 169, 41 S. Ct. 45; cf. Bass, Ratcliff & Gretton v. State Tax Commission, 266 U. S. 271, 69 L. ed. 282, 45 S. Ct. 82, supra; Butler Bros. v. McColgan, 315 U. S. 501, ante, 991, 62 S. Ct. 701.

"It does not appear that upon any theory the tax can be deemed to infringe the commerce clause."

It is true that in the case above referred to the Gas Company had a commercial domicile in Tennessee, but it will be observed that in the foregoing quotation the Federal Supreme Court declared that the tax could be levied on the net income of a foreign corporation "having a commercial domicile there, * * * *or upon net income derived from within the state.*" (Italics ours.) See also the case of International Elevator Co. v. Thorensen, 58 N. D. 777, 228 N. W. 192; Diefendorf v. Gallett, 51 Idaho 619, 10 Pac. (2d) 307; Humble Pipeline Co. v. State of New Mexico, 45 N. M. 29, 109 Pac. 247; and Stone v. General Contract Purchase Corp., 193 Miss. 301, 79 So. (2d) 806; and compare Lincoln National Life Ins. Co. v. State Tax Commission, 16 So. (2d) 369, not yet reported in our State Reports, all of which strongly support the contention of the appellant herein.

We, therefore, conclude that the trial court was in error in overruling the demurrer interposed by the State Tax Commission to the petition of the appellee Gas Company for a judicial review, and adjudicating the non-liability of the income taxes involved, and that the decree of the court below should be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and Remanded.

APPENDIX IV

Constitution of the State of Tennessee

Page 2014, Michie's Tennessee Code of 1938 Annotated.

Article 2, Section 28:

* * * The Legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem. * * *